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No. 91-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE V. VOINOVICH, *et al.*,

Appellants,

V.

BARNEY QUILTER, *et al.*

Appellees

On Appeal from the United States District Court for the Northern District of Ohio

BRIEF AMICI CURIAE IN SUPPORT OF APPELLEES OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.

INTEREST OF AMICI CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("the Fund") is a non-profit corporation that was

* Letters consenting to the filing of this brief have been filed with the Clerk of Court.

established for the purpose of assisting black citizens in securing the constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. *See, e.g., Houston Lawyers Ass'n v. Attorney General of Texas*, 111 S.Ct. 2376 (1991); *Chisom v. Roemer*, 111 S.Ct. 2354 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Hispanic voters in numerous voting rights cases, has frequently appeared before this Court in such cases, *see, e.g., City of Lockhart v. United States*, 460 U.S. 125 (1983), has challenged the redistricting of the most populous local jurisdiction in the country, *see Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. ___, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991), and has been intensely involved in redistricting advocacy following the 1990 census, *see, e.g., Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991)(three-judge court); *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992).

The National Asian Pacific American Legal Consortium ("NALPAC") is a nonprofit organization whose mission is to advance the legal and civil rights of

Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, education, and public policy development. The NALPAC is composed of three civil rights organizations that have advocated for the voting rights of Asian Pacific Americans: the Asian American Legal Defense and Education Fund (New York)s, the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific America Legal Center of Southern California (Los Angeles). All three members of the NALPAC have promoted the political empowerment of Asian Pacific Americans through litigation, legislative advocacy, and participation in state and local redistricting efforts.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens is an important part of the Committee's work. The Lawyers' Committee has represented black citizens in reapportionment before this Court in several cases including *Connor v. Finch*, 431 U.S. 407 (1977), and *Smith v. Clinton*, 488 U.S. 988 (1988), and has appeared in numerous other significant voting rights cases in this Court. *See, e.g., Clark v. Roemer*, 111 S.Ct. 2096 (1991).

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national civil rights organization founded in 1972 to protect the civil rights of Puerto Ricans and other Latinos, and to ensure their equal protection under the law. Since its inception, PRLDEF has worked to politically empower the Puerto Rican and Latino communities. Barriers to Latino political participation have been lifted, and voting rights violations have been successfully challenged by PRLDEF

in the courts and before the United States Department of Justice. PRLDEF is currently working to ensure an equal opportunity for Puerto Ricans and other Latinos in the redistricting process, which is, and has been, occurring throughout the country as a consequence of the decennial census.

SUMMARY OF ARGUMENT

The district court's opinions in this case fundamentally misunderstand the Voting Rights Act of 1965 and the Fifteenth Amendment. Reapportionment is an inherently political process, and this Court has authorized judicial intervention only when the process results in a plan that violates a federal constitutional or statutory provision.

Nonetheless, the judgment below should be affirmed because the challenged plan violated the principles of equipopulous districting laid out by this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny.[1] Once a constitutionally significant deviation in population among districts has been shown, the State bears the burden of justifying the deviation. In challenges to state legislative apportionments, this burden is triggered by a total population deviation of more than ten percent. *Brown v. Thompson*, 462 U.S. 835 (1983). In this case, it is

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[1] Under *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979), appellees, and thus *amici* supporting them, can defend the judgment "on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the District Court ...." We urge the Court to affirm solely on the narrow, albeit constitutional ground, that appellants failed to meet their burden of proof with regard to the one-person, one-vote issue.

undisputed that the challenged plan had a deviation of nearly thirteen percent. Nonetheless, appellants [hereafter the Apportionment Board] provided no evidence to substantiate their claim that the deviation was justifiable. In fact, at least a portion of the deviation was on its face unrelated to the professed state policy. Since the Apportionment Board failed to meet its burden of justifying an otherwise-unconstitutional deviation, the challenged plan must be invalidated.

But while the District Court correctly held that the Plan violated the Fourteenth Amendment on one-person, one-vote grounds, the remainder of its analysis was seriously flawed. To ensure that judicial invalidation of a plan developed and adopted by a state's political branches is warranted, Congress and this Court have required district courts to engage in an intensely local appraisal of the design and impact of a challenged plan, and to make detailed findings of fact. *Thornburg v. Gingles* and the Senate Report accompanying the 1982 amendments to the Voting Rights Act delineate a range of relevant factors for courts to consider.

But because state political entities, unlike federal courts, have inherent authority to engage in reapportionment, they are simply not subject to the same procedural and factfinding constraints. States are free to devise a variety of reapportionment processes, and to select from among a virtually infinite array of constitutionally and statutorily acceptable plans.

In this case, the district court turned these well-developed principles upside down. It required state political actors to follow the *Gingles*-Senate Report framework as a prerequisite to *adopting* a plan but it completely disregarded the framework as a prerequisite to

its own action in judicially *invalidating* the plan. The court below struck down Ohio's reapportionment plan [hereafter "the Plan"] without identifying *any* facts that would justify finding either a constitutional or a statutory violation. Because the district court never found that plaintiffs would suffer any cognizable injury as a result of the challenged plan -- indeed, plaintiffs' theory of the case was self-contradictory -- it erred in striking down the plan as violative of the Voting Rights Act. Moreover, the district court's treatment of the Fifteenth Amendment issue was shockingly offhanded: it simply asserted, without any discussion of underlying facts, that the plan was intentionally discriminatory.

ARGUMENT

I. THE CHALLENGED PLAN VIOLATED THE FOURTEENTH AMENDMENT'S REQUIREMENT OF ONE-PERSON, ONE-VOTE

The central command of the equal protection clause with respect to state legislative apportionment is clear: the "basic constitutional standard" of one-person, one-vote requires a State to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims,* 377 U.S. 533, 568, 577 (1964). If districts are malapportioned, the ballots cast by voters in heavily populated districts will be devalued relative to the votes cast by individuals in less-populated districts. This form of vote dilution is characterized as *quantitative* because it is based on mathematical comparisons of various district sizes. *Nevitt v. Sides,* 571 F.2d 209, 215 (5th Cir. 1978).

In response to the two post-*Reynolds* rounds of reapportionment activity, this Court has set out a clear analytic framework for assessing claims of quantitative vote dilution. In this case, application of the framework shows that the challenged plan failed to pass muster under the equal protection clause.

A. *The Analytic Framework for Evaluating Claims of Quantitative Vote Dilution*

Because the right to vote is so fundamental to the governance of a democratic society, "any alleged infringement ... must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562. Accordingly, once a plaintiff has made a prima facie showing of constitutionally significant population deviation, the State bears a heavy justificatory burden. This Court's decisions provide a three-step process for assessing this question.

1. *Proof of a Prima Facie Case*

The first step is to ask whether there is a constitutionally significant deviation in population among districts. In the context of state legislative reapportionment, this Court has squarely held that a total deviation of ten percent establishes a prima facie case. *See Brown v. Thompson*, 462 U.S. 835, 843 (1983); *White v. Regester*, 412 U.S. 755, 764 (1973). The plaintiffs bear the burden of proof on this issue, and if they fail to satisfy this "threshold requirement," their claim must be dismissed. *See id.* (deviation of 9.9% fails to meet threshold); *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973) (deviation of 7.83% fails to meet threshold).

Once plaintiffs have established a prima facie case, however, the burden shifts: Constitutionally significant deviations "must be justified by the State." *Brown v. Thompson*, 462 U.S. at 843. If the State fails to provide a sufficient justification, then the challenged plan must be invalidated.

2. *Identification of a Serious State Interest Served by the Deviation*

The second step of the process asks whether the challenged plan furthers a rational, legitimate state policy. *See, e.g., Brown v. Thompson,* 462 U.S. at 843-44; *Mahan v. Howell*, 410 U.S. 315, 324-26 (1973); *Abate v. Mundt,* 403 U.S. 182, 185-86 (1971); *Reynolds*, 377 U.S. at 577-81. Here, the State bears the burden of proof. And it is not enough simply to identify a potentially legitimate policy. Rather, the State must show why its "particular circumstances and needs," *Abate v. Mundt,* 403 U.S. at 185, justify more than the constitutionally *de minimis* variations already accounted for by the ten percent threshold.

That this second step requires an intensely local appraisal of the basis for the deviation can be seen from this Court's painstaking discussion of the particular governmental schemes at issue in previous one-person, one-vote cases. Although the Court has stated that preservation of subdivision boundaries may allow *some* deviation, *see, e.g., Brown v. Thompson*, 462 U.S. at 843-44; *Mahan v. Howell,* 410 U.S. at 325-27; *Reynolds*, 377 U.S. at 580-81, it has been equally clear that prior cases provide no blanket license for departures from equipopulous districting. In *Abate v. Mundt*, for example, the Court emphasized the fact that the same individuals occupied the governing positions both in the county

legislature and on the boards of supervisors of the constituent political subdivisions to justify an 11.9 percent total deviation that it would otherwise have been "hesitant to accept ...." *Id.* at 186. Similarly, in *Mahan v. Howell*, the Court pointed to the distinctive role of the Virginia General Assembly in enacting local legislation as a reason for upholding a plan whose 16.4 percent total deviation came close to "approach[ing] tolerable limits," 410 U.S. at 329. Finally, in *Brown v. Thompson*, the Court found a policy of giving each county its own representative had "particular force, given the peculiar size and population of the State [of Wyoming] and the nature of its governmental structure." 462 U.S. at 844. Of special significance to the present case, some Wyoming counties were so much smaller than an ideal district that their interests as counties would be totally submerged if they were combined with other counties to form equipopulous districts. *See id.* at 841 n. 5. In short, in each case, the Court has required a showing that the articulated policy was rational and legitimate in light of the State's particular governmental structure.

3. *Proof of a Close "Fit" Between Deviation and Policy*

The third step requires the State to show a close degree of "fit" between the actual deviations created by the challenged plan and the permissible state policy. It must show that the deviations incurred under its plan are necessary to the achievement of that policy. *Compare, e.g., Mahan v. Howell*, 410 U.S. at 326 (approving plan because it "produces the minimum deviation above and below the norm" attainable), *with Chapman v. Meier*, 420 U.S. 1, 25 (1975) (invalidating plan, despite legitimacy of state policy, because it was possible to achieve policy with plan using a smaller deviation), and *Kilgarlin v. Hill*, 386 U.S.

120, 124 (1967) (per curiam) (same). If alternative plans could achieve the State's goal while more closely complying with one-person, one-vote, then the deviation is unjustified.

B. *The Failure of the Challenged Plan*

That the challenged Plan is prima facie unconstitutional is clear. According to the 1990 census, Ohio has a total population of 10,847,133. App. to Juris. St. 49a. Since the Ohio House has 99 members, the ideal House district size is 109,567. *Id.* at 21a. Under the Plan, the smallest district, comprised solely of Ashtabula County, had a population of 99,821, *id.* at 52a n. 11, or 91.10 percent of an ideal district. The largest district, one of thirteen in Cuyahoga County, had a population of 114,955, *id.* at 56a, or 104.92 percent of an ideal district. Thus, the total population deviation of the Plan was 13.82 percent, well over the ten percent threshold.[2]

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[2] Ohio law would have permitted up to a 20 percent total deviation. *See* Ohio Const. art. XI, § 9 (requiring that "reasonable effort shall be made to create a house of representatives district consisting of the whole county" for any county that is at least 90 percent of the ideal district size and for any county that is not more than 110 percent of the ideal district size). Such a deviation would clearly raise serious questions: indeed, it is not clear that *any* legitimate policy could justify it. *See Mahan v. Howell*, 410 U.S. at 329; *cf. Brown v. Thompson*, 462 U.S. at 850 (O'Connor, J., concurring); *id.* at 853-56 (Brennan, J., dissenting).

To the extent, however, that the district court based its invalidation of the 1992 Plan on the statutory authorization of a 20 percent total deviation, rather than on the actual deviation created, *see* App. to Juris. St. 147a n. 12, it was mistaken: the real question in a one-person, one-vote case is whether the challenged plan unconstitutionally dilutes some citizens' votes, not whether a another

In the face of this presumptively unconstitutional malapportionment, the Apportionment Board has raised only the most perfunctory defense: "Ohio's longstanding policy to reflect political subdivision boundaries where reasonably possible." Juris. St. at 25. The Board has provided no details about Ohio's state or local governmental structure that might justify elevating artificial subdivision boundaries above a fundamental constitutional command. A bare citation of *Mahan v. Howell* and *Brown v. Thompson* cannot substitute for the detailed description of "particular circumstances and needs," *Abate v. Mundt*, 403 U.S. at 185, that this Court has always required. Unless this Court is prepared to abdicate completely its commitment in *Reynolds* to give "careful judicial scrutiny" to claims regarding political subdivision boundaries, 377 U.S. at 580-81, it simply cannot countenance appellants' desultory justification in this case.

Moreover, regardless of the legitimacy of Ohio's purported policy, the Apportionment Board failed to show that the deviations incurred under the Plan were entirely necessary to the achievement of that policy. First, it presented no evidence that the portion of the total deviation attributable to the size of the most populous district had *anything* to do with the purported policy. While the smallest single district is a whole-county district, the largest district is *not*. Rather, it is one of *thirteen* Cuyahoga County districts. *See* App. to Juris. St. 56a. Merely by redrawing districts entirely *within* Cuyahoga County, the total deviation of the Plan could have been reduced without any impairment whatsoever of the policy

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hypothetical plan might do so.

of preserving subdivisions.[3] Second, it is not altogether clear, given the number of split-county districts adjacent to Ashtabula County, *see Voinovich v. Ferguson*, 586 N.E.2d 1020, 1038-39 (Ohio 1992) (Resnick, J., dissenting), that portions of counties that were being split among districts anyway could not have been added to the Ashtabula-based district to bring it closer to the ideal district size. Given that Ashtabula would still have formed the vast majority of the district, it would have enjoyed an effective voice as a subdivision. *Cf. Brown v. Thompson*, 462 U.S. at 841 n. 5 (where Niobrara County was so small that it would be completely swamped in a multi-county district, deviation needed to give it its own district might be justified).

None of this is to say that it would have been impossible for the Apportionment Board to justify the deviations in the Plan. But the fact remains: it did not do so. Accordingly, this Court should affirm the holding of the district court that the Board "fail[ed] to provide sufficient justification for" a greater than ten percent total deviation.

II. THE DISTRICT COURT'S ANALYSIS OF THE CLAIM OF RACIAL VOTE DILUTION WAS FATALLY FLAWED

"From the beginning," this Court has maintained that "reapportionment is primarily a matter for legislative

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[3] Indeed, there is a substantial [9.2 percent] population deviation *among* Cuyahoga County districts: the smallest has a population of 104,872, while the largest has a population of 114,955. App. to Juris. St. 56a.

consideration and determination" and that "state legislatures have primary jurisdiction over legislative reapportionment." *White v. Weiser,* 412 U.S. 783, 794-95 (1973) (internal quotation marks omitted). Decisions about how to organize the legislature and how to allocate political power among competing groups lie at the very heart of democratic self-governance. Judicial intervention is warranted only when the normal, political -- almost inevitably partisan -- process fails.

Thus, the State's political agencies and the federal judiciary operate under very different constraints when they participate in the districting process. For example, if a court is called upon to develop a districting system for state offices, it must adhere far more closely to the one-person, one-vote standard than would a state legislature: a court must provide "some compelling justification" for deviations that would not demand any justification whatsoever were they created by a legislative plan. *See, e.g., Connor v. Finch,* 401 U.S. 407, 416-21 (1977); *see generally* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself,* 4 J.L. & Pol. 653, 662-64 (1988).

In this case, the court below made two critical errors. First, it imposed too onerous a standard on Ohio by requiring the Apportionment Board to undertake a full-blown section 2 liability analysis as part of its reapportionment process. Second, it improperly relaxed the constraints upon itself by invalidating a democratically created plan without undertaking any section 2 analysis at all.

A. *The Voting Rights Act Did Not Require the Apportionment Board to Use a Particular Analytic Framework as a Prerequisite for Reapportionment*

In the district court's January 31 opinion, the two reasons given for invalidating Ohio's Plan were that James Tilling, the Plan's architect, erroneously thought that the Voting Rights Act required him to maximize the number of districts with effective black voting majorities, *see* App. to Juris. St. 8a-10a, and that Tilling failed to conduct an adequate section 2 totality-of-the-circumstances analysis, *id.* at 11a-14a. Neither reason provides any basis for enjoining the Plan.

First, Tilling's opinion about the mandates of the Voting Rights Act is entirely irrelevant to the question whether the plan he produced passed muster under the Act. Thus, this Court need not address the question whether Ohio was *compelled* by the Voting Rights Act to create a significant number of majority-black districts. The only question properly before this Court is whether the Voting Rights Act *permitted* Ohio to take that tack.

As to this, the answer is plainly affirmative. In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), this Court upheld a voluntary, race-conscious districting plan for state legislative seats in Kings County, New York (Brooklyn). Justice White, joined in that part of his opinion by Justices Stevens and Rehnquist, noted that there was "no doubt that in preparing the [districting plan], the State deliberately used race in a purposeful manner," *id.* at 165: the State had intentionally drawn several districts with effective black voting majorities of between 65 and 90 percent, *see id.* at 151-52. Nevertheless, because the plan could be viewed as seeking "to achieve a fair allocation of political power between

white and nonwhite voters in Kings County," *id.* at 167, it was permissible.[4] Of particular salience to this case, *UJO* did not uphold the New York plan because the plan was necessarily *required* by the Voting Rights Act; rather, it upheld the plan because it represented one of potentially many acceptable responses to the political realities of Kings County.[5]

Moreover, to say that a State cannot pay attention to race in drawing districts ignores reality. By its very nature, the essence of the districting process is the aggregation of people by virtue of their group characteristics, whether these be geographical, political, social, or racial. *Cf. Reynolds v. Sims*, 377 U.S. at 623-24 (Harlan, J., dissenting). The reality of American life is

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[4] Although *UJO v. Carey* produced several opinions, only then-Chief Justice Burger explicitly disagreed with Justice White's analysis, and Justice Stewart, joined by Justice Powell, reached a conclusion on this issue essentially identical to Justice White's. *See* 430 U.S. at 179-80.

[5] Similarly, in *Gaffney v. Cummings*, this Court upheld a "bipartisan gerrymander" of the Connecticut State Assembly because the resulting plan "purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." 412 U.S. at 754. The Court noted that:

> The Board also consciously and overtly adopted and followed a policy of "political fairness," . . . . Senate and House districts were structured so that the composition of both Houses would reflect "as closely as possible . . . the actual [statewide] plurality of vote on the House or Senate line in a given election."

Id. at 738.

The Court's discussion frequently relied on racial vote dilution cases in reaching its conclusion, *see id.* at 753, 754, thus suggesting that a similar analysis would apply in the context of claims of race-conscious but fair districting.

that black communities are often geographically compact and that black voters often share a variety of socioeconomic characteristics that affect their voting behavior. Since the demographic profiles of a State "are available precinct by precinct, ward by ward," *Gaffney v. Cummings*, 412 U.S. at 735, it would be essentially impossible for a districting body not to foresee the likely racial impact of possible apportionment schemes.

Second, since the Apportionment Board was not required to justify its decision to draw majority-black districts by first establishing that alternative approaches would violate section 2, it had no obligation to conduct any formal inquiry before proposing its plan. The district court's holding to the contrary reflects a complete misunderstanding of the basis of the Apportionment Board's authority.

To ensure that judicial invalidation of a democratically adopted plan is warranted, Congress and this Court have required district courts to engage in an intensely local appraisal of the design and impact of a challenged plan, and to make detailed findings of fact. *Thornburg v. Gingles* and the Senate Report accompanying the 1982 amendments to the Voting Rights Act create a detailed analytic structure for this necessary judicial factfinding. *See Thornburg v. Gingles*, 478 U.S. at 46-51; S. Rep. No. 97-417, pp. 28-29 (1982) ["Senate Report"]. The district court must "consider the totality of the circumstances and ... determine, based upon a searching practical evaluation of the past and present reality .... [and] an intensely local appraisal of the design and impact of the contested electoral mechanisms" whether black voters have an equal opportunity to participate and elect their preferred candidates. *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted).

The totality-of-the-circumstances inquiry mandated by the Senate Report and *Gingles* is a prerequisite to finding section 2 liability. But neither Congress nor this Court has ever required states to undertake a similarly painstaking analysis before they enact a plan in the first instance. Such a requirement would run roughshod over longstanding principles of federalism and deference to the political branches in this most quintessentially political of endeavors. Of course, states are free to consider various *Gingles* or Senate Report factors in developing their plans, and prudent plan drawers might seek to avoid the later invalidation of their plans by thinking about whether the plans comply with section 2. And legislatures should review alternative plans to ensure that the plan they ultimately select does not dilute minority voting strength. But as long as the plan a State ultimately adopts does not violation section 2, the analysis a State used to arrive at that plan is not subject to being questioned separately.

In short, the district court's January 31 opinion provided absolutely no basis for invalidating Ohio's Plan.

B. *The District Court Itself Failed to Comply With Section 2's Requirements*

Because it was preoccupied with its idiosyncratic theory imposing upon the Apportionment Board the obligation to follow *Gingles*' analytic framework, the court below completely neglected to follow section 2 itself. The district court failed to find a single fact that would justify a conclusion that Ohio's Plan violated the Voting Rights Act.

To begin with, the district court completely flouted *Gingles*' directive to conduct an "intensely local appraisal

of the design and impact of the contested electoral mechanisms." 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). In *Gingles* itself, after all, this Court upheld North Carolina's use of a multimember district in the Durham area despite finding such districts invalid in other parts of the State. *See id.* at 77. And it specifically disapproved of lumping different challenged districts together: "The inquiry into the existence of vote dilution ... is district-specific. When considering several separate vote dilution claims in a single case, courts must not rely on data aggregated from all the challenged districts ...." *Id.* at 59 n. 28. In this case, however, one can search the district court's opinions in vain for *any* description of the characteristics of the various challenged districts that result in the denial of an equal opportunity for black voters to elect their preferred candidates. Indeed, the majority opinion does not even identify the challenged districts by number. The closest it comes to discussing any relevant information about the challenged districts is to mention the "average plurality" received by black candidates in various unidentified districts in various unspecified elections sometime between 1984 and 1990, App. to Juris. St. 7a, and to refer to the level of crossover voting in some districts, *id.* at 133a. But the court made no factual findings at all with regard to the socioeconomic disparities, past election results, campaign issues or any other Senate Report factor.

As a consequence, the district court never identified how black voters were actually injured by the challenged plan. It referred to plaintiffs' contention that the Plan involved both improper "packing" and "cracking," App. to Juris. St. 7a, but it never identified where either of these injuries occurred.

This cavalier treatment not only defied the clear requirements of *Gingles*; it also flouted the requirement of Fed. R. Civ. P. 52(a) that the court make findings of fact sufficient to permit intelligent appellate review. Even the most cursory comparison of the opinions in this case with the detailed treatment of racial vote dilution claims by two district courts whose conclusions were affirmed by this court -- *see Thornburg v. Gingles*, *see Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984), *aff'd* 478 U.S. 30 (1986); *Jeffers v. Clinton*, 730 F. Supp. 196, 204-05 (E.D. Ark. 1989) (three-judge court), *summarily aff'd*, 111 S. Ct. 662 (1991) -- shows how far short of the mark the opinions in this case fell. And for a court to devote one sentence, with no factual support, to a holding that the State of Ohio was deliberately racist in adopting the Plan -- the clear import of its finding that there was a Fifteenth Amendment violation, *see* App. to Juris. St. 119a -- is judicially irresponsible. Moreover, it is not defensible under this Court's precedent. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55 (1980).

Moreover, had the district court paid any serious attention to the issue, it would soon have seen that plaintiffs' theory of their case contained within itself its own rebuttal. Plaintiffs began by claiming that under the 1981 apportionment scheme, some black voters in particular majority white districts were nonetheless able to elect the candidates of their choice. *See* App. to Juris. St. 7a, 13a, 132a-33a.[6] If that is true (and *amici* take no

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[6] We also note, by the way, the essential triviality of evidence of responsiveness such as the voting records of white legislators who are not dependent on the support of the black community for their continued tenure. Although the district court pointed to such evidence, *see* App. to Juris. St. 7a, it failed to heed the Senate Report's directive that "proof of some responsiveness" is not

position on that question), then, at least as to those districts, there was no legally significant racial bloc voting. *See Thornburg v. Gingles*, 478 U.S. at 54-61 (discussing the concept). But if there was no legally significant racial bloc voting under the 1981 plan, then unless plaintiffs can show that the 1991-92 Plan somehow generates legally significant racial polarization -- and there is nothing in the record to support this claim -- they cannot demonstrate one of the two "most important Senate Report factors," namely, racial bloc voting. *Thornburg v. Gingles*, 478 U.S. at 48 n. 15.

Because the district court failed to find *any* of the facts that tend to show that under a challenged plan, blacks have less opportunity than other citizens to participate in the political process and elect the representatives of their choice, it had absolutely no basis for striking down the Plan as violative of the Voting Rights Act. The complete failure to conduct the required "intensely local appraisal" makes this case an inappropriate vehicle for considering fine points about how courts should assess section 2 challenges. Thus, contrary to the Solicitor General's invitation, *see* Brief for the United States as Amicus Curiae Supporting Appellants at 10, 15-16, this Court should not address the broader questions of whether and how each of the *Gingles* preconditions should apply to state reapportionment

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particularly probative. *See* Senate Report at 29 n. 116. In part because the finding of responsiveness is so subjective and so dependent on which aspects of legislative performance are deemed relevant, courts have generally avoided the inquiry. *See, e.g., Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge court), *aff'd*, 478 U.S. 30 (1986).

plans.[7]

C. *The District Court's Holding on Plaintiffs' Fifteenth Amendment Claim was Unsupportable*

The district court's treatment of the Fifteenth Amendment issue is unfortunately typical of its overall approach to this case. Almost as an aside in its March 10 Order, the district court included one sentence: "As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issue presented, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution." App. to Juris. St. 119a. That sentence -- and a brief assertion that the Board must have intended to dilute black voting since that is the likely effect of the Plan, *id.* at 141-42a -- is the sum total of the lower court's analysis of plaintiffs' claim that the State of Ohio deliberately set out to deny its black citizens their fundamental constitutional right to vote.

It is hardly surprising that the district court cited no case law from this Court in support of its holding, for to cite the only case in which this Court has struck down a State's delineation of district boundaries on Fifteenth Amendment grounds would have showed the complete absurdity of the district court's holding. There is nothing in this record to suggest that Ohio's decision to draw several majority-black legislative districts even remotely

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[7] If the Court ultimately remands this case for further proceedings in the district court, those issues can be addressed in the first instance in the context of the kind of detailed factfinding required in section 2 cases.

resembles Alabama's complete exclusion of black voters from Tuskegee, *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Amici emphasize that we take no position on the sort of proof of discriminatory intent which might establish a *Fourteenth* Amendment violation: that issue was neither raised, briefed, nor decided below and this Court therefore should not reach it. *But cf. Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (setting out the standard for assessing Fourteenth Amendment-based claims of racial vote dilution). We argue here only that no *Fifteenth Amendment* violation has been shown. The court below erred in transforming its disagreement with the political philosophy of the Ohio Apportionment Board into a constitutional condemnation of the Board as intentionally discriminatory.

CONCLUSION

This Court should affirm the judgment below solely on the ground that the Board failed to provide sufficient justification for the maximum population deviation among districts.

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